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No. 80-2165

In The

Supreme Court of the United States

October Term, 1980

JAMES M. MURPHY,
District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

vs.

EUGENE L. HUNT,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED JUNE 22, 1981
PROBABLE JURISDICTION NOTED
OCTOBER 5, 1981

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF IMPORTANT DATES

June 9, 1980 —Plaintiff's complaint filed in United States District Court for the District of Nebraska

July 22, 1980 —Defendant's Answer filed

August 1, 1980 —Order entered by United States District Court approving parties' stipulation to have case submitted and decided on specified exhibits and briefs

October 17, 1980 —Memorandum and Order entered by United States District Court denying plaintiff relief and dismissing his complaint

October 24, 1980 —Plaintiff's appeal to United States Court of Appeals for the Eighth Circuit filed

February 10, 1981—Plaintiff's appeal orally argued and submitted to United States Court of Appeals

May 13, 1981 —Opinion filed by United States Court of Appeals holding challenged 1978 bail amendment to Nebraska Constitution to violate Eighth and Fourteenth Amendments of the United States Constitution, reversing the District Court's dismissal of plaintiff's complaint, and remanding case for issuance of a declaratory judgment in accord with its opinion

June 22, 1981 —Defendant's notice of appeal and Jurisdictional Statement filed in Supreme Court of the United States

July 20, 1981 —Plaintiff's Motion to Affirm or Dismiss filed in Supreme Court

October 5, 1981 —Supreme Court notes probable jurisdiction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil No. 80-0-377

EUGENE L. HUNT, Plaintiff

vs.

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska, Defendant

EXHIBIT 9

NEBRASKA LEGISLATIVE BILL 553 (1978) PROPOSING CONSTITUTIONAL AMENDMENT TO RENDER CERTAIN SEXUAL OFFENSES NONBAILABLE

Approved by Governor April 24, 1978

(Case Numbers Omitted in Printing)

LAWS

Passed by the
LEGISLATURE OF THE STATE OF NEBRASKA
EIGHTY-FIFTH LEGISLATURE
SECOND SESSION
1978

(Irrelevant Introductory Material Omitted in Printing)

(Nebraska Secretary of State's Authentication Omitted in Printing)

LEGISLATIVE BILL 553

Approved by the Governor April 24, 1978
Introduced by Duis, 39

AN ACT for submission to the electors of an amendment to Article I, section 9, of the Constitution of Nebraska, relating to the Bill of Rights; to provide that sexual offenses shall be nonbailable; to provide for the time and manner of submission and form of ballot; and to provide the effective date thereof.

Be it enacted by the people of the State of Nebraska,

Section 1. That at the general election in November, 1978, there shall be submitted to the electors of the State of Nebraska for approval the following amendment to Article I, section 9, of the Constitution of Nebraska, which is hereby proposed by the Legislature:

"Sec. 9. All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Sec. 2. The proposed amendment shall be submitted to the electors in the manner prescribed by Article XVI, section 1, of the Constitution of Nebraska. The proposition for the submission of the proposed amendment shall be placed upon the ballot in the following form:

"Constitutional amendment to provide, that certain sexual offenses shall be nonbailable.

For

Against"

Sec. 3. That the proposed amendment, if adopted, shall be in force and take effect immediately upon the completion of the canvass of the votes, at which time it shall be the duty of the Governor to proclaim it as a part of the Constitution of Nebraska.

(-1-) (329)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 7

NEBRASKA GOVERNOR'S PROCLAMATION
OF ENACTMENT OF 1978
NO-BAIL CONSTITUTIONAL AMENDMENT

Signed December 5, 1978

EXHIBIT 7

(Case Numbers and Nebraska Secretary of State's Certificate and Seal Omitted in Printing)

STATE OF NEBRASKA
Executive Office

LINCOLN

PROCLAMATION

(Filed December 5, 1978)

WHEREAS, there has been submitted to the voters of the State of Nebraska, for their approval or rejection, at the regular General Election held on the seventh day of November 1978, proposed by Legislative Bill 553 of the Eighty-Fifth Legislature—Second Session, the following proposition:

"The following amendment to Article I, Section 9, of the Constitution of Nebraska—'Sec. 9. All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.'"

AND WHEREAS, it appears by the canvass of the State Board of Canvassers that, at said General Election, 355,949 votes were cast in favor of said measure and 79,179 votes were cast against it; that a majority of the electors voting on said measure adopted it; and that the votes case in favor of the measure were not less than thirty-five percent of the total votes cast in said election:

THEREFORE, I, J. James Exon, Governor of the State of Nebraska, by virtue of the power vested in me by the Constitution and Laws of the State, DO HEREBY PROCLAIM AND DECLARE the said measure to have been approved by the constitutional majority of the people voting on this measure and the said amendment now to be in full force and effect as a part of the Constitution of the State of Nebraska.

IN WITNESS WHEREOF, I hereunto subscribe my name and cause to be affixed the Great Seal of the State of Nebraska this 5th day of December, One Thousand Nine Hundred and Seventy-Eight.

(Seal Omitted in Printing)

/s/ J. J. Exon
Governor

/s/ Allen J. Beermann
Secretary of State

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 11

SURVEY OF DISPOSITION OF NO-BAIL SEXUAL OFFENSE PROSECUTIONS DURING ONE YEAR AFTER APPROVAL OF NO-BAIL AMENDMENT

Dated November 8, 1979

EXHIBIT 11

(Case Numbers Omitted in Printing)

(Compiled by the Douglas County Public Defender for use as an exhibit attached to its Petition for Rehearing of the order denying its Petition for Writ of Certiorari in *Parker v. Roth*, No. 79-5004, United States Supreme Court)

DISPOSITION OF KNOWN NO BAIL FIRST-DEGREE SEXUAL ASSAULT CASES UNDER "RAPE-BAIL" AMENDMENT TO ARTICLE I, SEC. 9, NEBRASKA CONSTITUTION AS OF NOVEMBER 8, 1979

•indicates charge of *nonforcible* sexual assault

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Donald Dillon	Dawson County District Court	?	1-12-79	acquitted by jury 3-16-79	64
•Gaines Havens	Phelps County District Court	6878	5-25-79	acquitted by jury 7-19-79	56
Herbert Hopkins	Adams County District Court	20207	8-1-79	jury trial now in progress	100

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Gary Tatum	Buffalo County District Court	5934	9-12-79	jury trial now in progress	57
Thomas Friel	Lancaster County District Court	53-14	2-6-79	amended to third-degree sexual assault (bailable misdemeanor)	145
Victor Avila	Lancaster County District Court	53-133	4-23-79	amended to third-degree sexual assault (bailable misdemeanor) and bail set 7-25-79	94
Faustos Gonzales	Lancaster County Court	174-44	5-7-79	amended to disturbing the peace (bailable misdemeanor) and bail set 6-8-79	30
Paul Hollenbeck	Lancaster County Court	164-67	5-9-79	dismissed 6-25-79	2
Harry Britain	Lancaster County District Court	53-209	6-4-79	amended to third-degree sexual assault (bailable misdemeanor)	73
Alan Adkins	Lancaster County District Court	54-22	6-25-79	amended to attempted sexual assault (bailable felony)	112
Vincent Harroun	Lancaster County District Court	53-257	6-26-79	amended to burglary (bailable felony) and bail set 10-22-79	116

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Ezra Wright*	Douglas County District Court	105-91 & 109	4-23-79	charged with and found guilty after a bench trial of nonforcible sexual assaults on two minors on 8-8-79	107
Kenneth Hitt*	Douglas County District Court	105-110	4-30-79	charged with and found guilty by a jury on 9-12-79 of nonforcible sexual assaults on two minors	136
Edward Boyd	Douglas County District Court	106-46	9-4-79	pending	65
James Joyce	Douglas County District Court	106-89	9-19-79	pending	50
Anthony Williams*	Douglas County District Court	106-107	9-21-79	pending charges of non-forcible sexual assaults on two minors	48
Alonzo Sturgeon	Douglas County District Court	106-114, 115, 134	6-8-79 9-26-79	pending	153
Magellan Hudson	Douglas County District Court	106-125	9-27-79	pending	43
Floyd Maeberry	Douglas County District Court	106-126	9-27-79	pending	43

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. of Days Held w/o Bail
Charles Anderson*	Douglas County District Court	106-185	10-16-79	pending charge of non-forcible sexual assault on a minor	24
Minh Nguyen*	Douglas County District Court	106-189	10-17-79	pending charge of non-forcible sexual assault on a minor; bail initially refused and later set on 11-1-79	15
Michael Charlie	Lancaster County District Court	53-260	6-26-79	amended to terroristic threat (bailable felony)	30
Carl Kelly	Lancaster County Court	174-751	7-10-79	dismissed 7-18-79	9
Steve Wilson	Lancaster County District Court	53-278	7-14-79	amended to nonsexual misdemeanor assault (bailable) 7-23-79	10
Thomas Welchel	Lancaster County District Court	54-56	8-6-79	pending	94
Michael Fields	Lancaster County Court	174-1086	8-10-79	amended to nonsexual misdemeanor assault (bailable)	11
Joseph George	Lancaster County District Court	54-83	8-14-79	pending	86

Name	Court in which Prosecuted	Case No.	Date of Arrest or Charge	Nature of Disposition	No. o Days Held w/o Ba
Virgil Riley	Lancaster County Court	175-267	9-26-79	amended to contributing to the delinquency of a minor (bailable misdemeanor)	1
Vincente Garza	Douglas County District Court	104-264	1-12-79	dismissed 3-20-79	67
Terry Parker	Douglas County District Court	104-267	1-12-79	amended to third-degree sexual assault (bailable misdemeanor) and bail set on 3-27-79	74
Joyce Tipton	Douglas County District Court	105-32, 33, 34 & 35	4-2-79	found guilty as charged after bench trial and committed as Mentally Disordered Sex Offender on 7-13-79	102
Alon Washington*	Douglas County District Court	105-84	4-18-79	charged with and found guilty by a jury on 6-12-79 of nonforcible sexual assault on an incompetent	55

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 5

TRANSCRIPT OF PLAINTIFF'S BAIL REVIEW HEARING BEFORE DEFENDANT NEBRASKA STATE DISTRICT JUDGE

Held May 23, 1980

(Case Numbers Omitted in Printing)

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

Doc. 107 Nos. 409, 410, 411

BILL OF EXCEPTIONS

Volume I — Index, Proceedings
(Pages A, 1-5)

THE STATE OF NEBRASKA,

Plaintiff,

vs.

EUGENE L. HUNT, a/k/a
EARL CAMPBELL,

Defendant.

Proceedings heard before The Honorable James M. Murphy, Judge, on 23 May, 1980; taken before Gary Don Luckert, Official Court Reporter, in District Courtroom No. 2, Douglas County Hall of Justice, Omaha, Nebraska 68183.

(Court Reporter's Notary Seal and Clerk's Filing Samp Omitted in Printing)

(Court Reporter's Certificate Omitted in Printing)

(Page 2)

(At 1:15 P.M. on 23 May, 1980, in the District Court of Douglas County, in Omaha, Nebraska, before The Honorable James M. Murphy, one of the judges of said court, with Mr. Thomas P. McKenney appearing as counsel for the plaintiff and Mr. Bennett G. Hornstein and Mr. Ivory Griggs appearing as counsel for the defendant, and the defendant present, the following proceedings were had:)

The Court: Are you ready to proceed?

Mr. Hornstein: Okay, Your Honor, we're here today in these three cases of Mr. Hunt, consecutive docket numbers. The purpose of this appearance is to have a bail review by the Court pursuant to Sec. 29-901.03, which provides that any time—24 hours after bail has been imposed or some sort of bail has been set or refused and the defendant's unable to make bail, he can appeal to a District Judge to have the lack of release reviewed. My understanding of the usual procedure is that there's no written motion filed.

The Court: No, it's customary that we review the bonds on the request of counsel orally.

Mr. Hornstein: Okay. So we're just making an oral request. We haven't filed any written motion because I understand that's not required by the usual custom here.

Now, the—My Understanding—although the Municipal Court transcript, I don't think, is in the file yet—is that Mr. Hunt appeared in Municipal Court sometime within the last couple of weeks, and he's got several charges against him. There are four (Page 3) first-

degree-sexual-assault charges and several other felony charges, nonsexual felony charges.

And at that time Judge Wolf of the Municipal Court set bail on all the charges except for the first-degree-sexual-assault charges. And it's our belief that the reason he didn't set bail on the four sexual-assault charges was because of the constitutional amendment that was passed in late 1978, which amended Article I, Sec. 9, of the Nebraska Constitution to provide that, in certain sexual-offense cases, bail could be refused.

And the purpose of this review today is to have the Court review that denial of bail just on those four charges. We're not interested in having bail reviewed on the other charges.

And, just as a bit of background, our office file, based on the interview with Mr. Hunt, reflects that he's lived in Omaha continuously since 1960. He denies any prior significant criminal record, certainly any felonies. Now, according to our record, we have no—There may have been some arrests, but he denies any convictions.

And, according to the Nebraska bail statutes, the purpose—or exclusive purpose of bail, according to the statutes, is to reasonably assure the appearance of the defendant as required. And our feeling is that—that the denial of bail on this case is unjustified, although I realize that the constitutional amendment overrides this—these statutes.

And, for purposes of bail only—My understanding is that (Page 4) Mr. Hunt has already pled not guilty at a prior arraignment. For purposes of this hearing

only, we would stipulate that the proof is evident and the presumption is great for your consideration under the—under the Article I, Sec. 9, bail amendment.

The Court: Is it stipulated by the State that the proof would be great. . . .

Mr. McKenney: Yes, it is, Your Honor.

Mr. Hornstein: Yeah, just of these four sexual-assault charges that we're considering. My understanding is he waived the preliminary hearing on those charges.

The Court: May I have the decision on Parker? Mr. Hunt in a case which came up before this Court in 1979 and which was appealed to the State Supreme Court of Nebraska, the constitutionality of this section of the State Constitution was challenged; and the Supreme Court of the State of Nebraska held that the provision which permits a judge not to allow bail in a first-degree-sexual-assault case, forcible-sexual-assault case, where the evidence is strong and the proof is—How does that . . .

Mr. Hornstein: I think it's where the proof is evident and the presumption is great, which is what we're stipulating to.

The Court: Where the proof is evident and the presumption is great, that a court need not set bail. And, for that reason, your request is denied. And it's the order of the Court that you be held on Doc. 107-409 on one count of first-degree sexual assault on a child without bail; in Doc. 107-410, on one count of (Page 5) first-degree, forcible sexual assault, that you be held without bail; and in Doc. 107-411, on two counts of first-degree,

forcible sexual assault, that you're to be held without bail. The previsions on the other counts set for bail will be the same as they were set in Municipal Court. Anything further?

Mr. Griggs: No, Your Honor.

Mr. Hornstein: No.

Mr. Griggs: Thank you very much, Your Honor.

The Court: The docket entry will so reflect *Parker v. Roth.*

Mr. Hornstein: Okay, Judge.

(This record ended at 1:27 P.M.)

END OF PROCEEDINGS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PLAINTIFF'S FEDERAL COMPLAINT
Filed June 9, 1980

(Caption Omitted in Printing)

The Complaint of Eugene L. Hunt respectfully shows that:

1. Plaintiff and Defendant are citizens of the United States of America and the State of Nebraska.

2. This action arises and this Court has jurisdiction of this action under Title 42 United States Code, Sections 1983 and 1988, and Title 28 United States Code, Section 1343.

3. At all times pertinent to this Complaint, the Defendant was a Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska, and in doing the acts and things hereinafter set forth, said Defendant was acting in said capacity, under color of a 1978 Amendment to the Bail Clause of Article I, Section 9 of the Constitution of Nebraska providing that

> "All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great". (Emphasis added on new language of 1978 Constitutional Amendment).

4. Plaintiff is presently in custody and imprisoned in the Douglas County, Nebraska Corrections Center pursuant to an order and judgment of the Defendant District Judge entered on May 23, 1980, denying Plaintiff's motion that bail be fixed on certain charges of first degree sexual assault pending against him in Douglas County, Nebraska.

5. Plaintiff has been subjected because of the above-recited denial of his motion for bail by the Defendant in reliance upon the aforementioned 1978 Amendment to the Bail Clause of the Nebraska Constitution, to the deprivation by the Defendant, under color of law, and of the customs and usages of the State of Nebraska, of rights, privileges, and immunities secured to Plaintiff by the Constitution and Laws of the United States, and particularly his Federal Constitutional rights to be free from excessive bail and cruel and unusual punishment, to due process and equal protection of the laws, and to the effective assistance of counsel under the Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiff prays for:

1. A judgment declaring that the aforementioned 1978 Amendment to the Bail Clause of Article I, Section 9 of the Constitution of Nebraska rendering certain sexual offenses, such as those with which the Plaintiff is presently charged, nonbailable is unconstitutional under the aforementioned provisions of the United States Constitution.

2. A judgment permanently enjoining the further application or enforcement of the aforementioned 1978 Amendment to the Bail Clause of the Nebraska Constitution.

3. A judgment for Plaintiff's court costs, attorney fees and litigation costs under Title 42 United States Code, Section 1988, and other necessary and just relief.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DEFENDANT'S ANSWER

Filed July 22, 1980

(Caption Omitted in Printing)

COMES NOW the defendant by and through his attorneys and for his answer to the complaint in the above captioned action, admits, denies, and alleges as follows:

1. Admits the allegations in paragraphs numbered 1, 2, 3, and 4 of the plaintiff's petition.

2. Denies the allegations in paragraph number 5 of the plaintiff's petition.

3. Alleges that there has been no deprivation of the plaintiff's rights secured him by the United States Constitution as a result of his being denied bail under Article I, section 9 of the Constitution of the State of Nebraska.

WHEREFORE, the defendant moves this court to dismiss this complaint for the reason that there has been no deprivation of the plaintiff's rights secured him by the United States Constitution and for such other relief as this court may deem appropriate and proper.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ORDER APPROVING PARTIES STIPULATION TO HAVE CASE SUBMITTED AND DECIDED ON SPECIFIED EXHIBITS AND BRIEFS

Entered August 1, 1980

(Captions Omitted in Printing)

This matter comes before the Court upon the Stipulation of all of the parties hereto, and the Court, being fully advised in the premises finds that said Stipulation is acceptable to the Court and should be effected by this Order.

IT IS, THEREFORE, ORDERED that:

1. These two cases are hereby consolidated for briefing, oral argument if any, consideration, and decision by the Court.

2. Petitioner-Plaintiff shall be allowed until August 8, 1980 to file his brief addressing the merits of these two cases; Respondents, Defendant, and the intervenor shall

be allowed ten days from the receipt of the foregoing brief to file their briefs responding thereto, and the Petitioner-Plaintiff shall be permitted five days thereafter to reply.

3. The numbered exhibits, a list of which is attached hereto, including the state trial court records and other documents, are hereby deemed admitted into evidence by the Court for its consideration in lieu of any evidentiary hearing which might be ordered in the above-captioned habeas corpus case or trial in the above-captioned civil rights case.

4. Upon receipt by the Court of the aforementioned briefs of the parties and the stipulated evidentiary exhibits, both of these cases shall be deemed fully submitted for consideration and decision by the Court, subject to the Court's right to request oral argument of counsel which shall be deemed waived by all the parties if such oral argument will result in a substantial delay in the Court's consideration and decision of these cases.

DATED this 1st day of August, 1980.

BY THE COURT:

/s/ Robert V. Denney
United States District Judge

(Attached List of Stipulated Exhibits Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ORDER DENYING PLAINTIFF RELIEF
AND DISMISSING COMPLAINT

Entered October 17, 1980

(Caption Omitted in Printing)

In accordance with the Memorandum opinion issued contemporaneously herewith,

IT IS HEREBY ORDERED that the declaratory and injunctive relief sought by plaintiff in his complaint is denied, and the complaint is thus dismissed.

Dated this 17th day of October, 1980.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MEMORANDUM OPINION OF UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
NEBRASKA DENYING PLAINTIFF RELIEF
AND DISMISSING COMPLAINT

Filed October 17, 1980

The Memorandum Opinion of the United States District Court appears beginning at Page App. 39 in Appendix B of the Appellant's Jurisdictional Statement.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT REVERSING THE JUDGMENT OF THE DISTRICT COURT

Filed May 13, 1981

The opinion of the United States Court of Appeals for the Eighth Circuit appears beginning at Page App. 1 in Appendix A of the Appellant's Jurisdictional Statement.